Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

FILIBERTO E. MONTOYA
and ROSARIO MONTOYA,

Petitioners,

- vs -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the decision to prosecute an immunized witness based solely on the content of that witness' immunized testimony violates the Fifth Amendment to the Constitution, Kastigar v. United States, 406 U.S. 441 (1972), and 18 U.S.C. § 6002.

Whether the decision to prosecute an immunized witness and his wife based solely on the content of this witness' immunized testimony is vindictive prosecution in violation of the Due Process Clause of the Fifth Amendment.

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- vs -

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, Filiberto E. Montoya and Rosario Montoya, respectfully pray that a writ of certiorari issue to review the judgment of the United

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States Court of Appeals for the Ninth Circuit entered on May 13, 1995.

I.

THE OPINION BELOW

This Petition for Certiorari is from the published opinion by the Ninth Circuit Court of Appeals in United States v. Montoya, 45 F.3d 1286 (9th Cir. 1995) ("the Opinion"). A true and correct copy of the Opinion is attached hereto as Appendix A.

On May 13, 1995, the Ninth Circuit Court of Appeals denied a petition for rehearing of this case, with Senior Circuit Judge Bright voting for rehearing, and denied petitioners' suggestion for rehearing en banc, with Senior Circuit Judge Bright recommending en banc review. A true and correct copy of that order is attached hereto as Appendix B.

II.

JURISDICTION OF THIS COURT

On January 12, 1995, the Ninth Circuit Court of Appeals entered the Opinion, with a dissent by Senior Circuit Judge Bright, affirming the convictions of

Rosario Montoya and Filiberto E. Montoya. (Appendix A.) On May 13, 1995, the Ninth Circuit Court of Appeals denied the petition for rehearing, with Senior Circuit Judge Bright voting for rehearing, and denied the suggestion for rehearing en banc, with Senior Circuit Judge Bright recommending en banc review. (Appendix B.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law . . . .

Title 18, U.S.C. § 6002:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or

provide other information in a proceeding before or ancillary to

(1) a court or grand jury of the United States;

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a sub-committee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except in a prosecution for perjury, giving a false statement, or

otherwise failing to comply with the order.

IV.

STATEMENT OF THE CASE

A. The Facts

In the fall of 1988, Assistant United States Attorney ("AUSA") Reese, who was participating in investigations of money laundering in San Diego County and similar crimes in Oklahoma, was contacted by an attorney on behalf of Petitioner FILIBERTO E. MONTOYA ("Mr. Montoya"). AUSA Reese wrote a letter granting Mr. Montoya informal immunity and interviewed him in November, 1988, and January, February and May, 1989. Based on those discussions, AUSA Reese decided to call Mr. Montoya as a witness. Mr. Montoya was granted court ordered immunity, 18 U.S.C. § 6002, and he testified before the grand jury in San Diego in January, 1989, and at the Oklahoma trial in May 1989. (The Opinion at 1298.)

In February, 1990, AUSA Reese prepared a Memorandum to the United States Attorney requesting that authority be sought from the Department of Justice

to prosecute Mr. Montoya for the very acts about which he had testified. AUSA Reese explained that Mr. Montoya "appeared to testify falsely . . ." and "[was] also believed to have testified falsely during a trial (although a perjury prosecution could not be sustained) . . . ." After review of AUSA Reese's Memorandum by the United States Attorney and the Department of Justice, permission to prosecute was granted by the United States Attorney General. (The Opinion at 1290.)

Mr. Montoya's immunized testimony was therefore used three times by the government: (1) by AUSA Reese in deciding to initiate prosecution of Mr. Montoya and his wife; (2) by the United States Attorney in seeking permission to prosecute Mr. Montoya and his wife, and; (3) by the United States Attorney General in granting permission to prosecute Mr. Montoya and his wife. In the Opinion, the Dissent believed those "uses" violated the Fifth Amendment, Kastigar v. United States 406 U.S. 441 (1972), and

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18 U.S.C. § 6002. (The Opinion at 1301-03, J. Bright dissenting.) (Citations omitted.)

B. The Opinion

In the Opinion, the Ninth Circuit Court of Appeals, over the dissent of Senior Circuit Judge Bright, held, in part, it did not violate the Fifth Amendment privilege against self-incrimination, 18 U.S.C. § 6002, or Kastigar v. United States, 406 U.S. 441 (1972) for the government to use a review of Mr. Montoya's immunized testimony and nothing more in deciding whether Mr. Montoya should be prosecuted. Senior Circuit Judge Bright dissented because the "decision to initiate prosecution of an immunized witness may be considered non-evidentiary use of immunized testimony." (The Opinion at 1301, J. Bright, dissenting.) (Citation omitted.)

The Opinion also held that the Montoyas failed to prove "an improper prosecutorial motive through objective evidence" to allow a presumption of vindictive prosecution, and thus concluded the presumption of vindictiveness did not arise. (The Opinion at 1299.)

Senior Circuit Judge Bright dissented, and found there was a presumption of vindictiveness because the government "did not have enough proof to proceed with perjury charges" and "decided to punish Mr. Montoya with using the information the Government always had to prosecute him, and then, for extra measure, proceeding to recommend prosecution of Mrs. Montoya." (The Opinion at 1303, J. Bright, dissenting.)

Senior Circuit Judge Bright noted further,

> the Government should have prosecuted Montoya initially, rather than granting him immunity. [The Government], however, resorted to subterfuge. If Montoya lied, [the Government], under the statute, could have initiated the prosecution for perjury. Instead, [the Government] turned Montoya's Fifth Amendment privilege against self-incrimination on its head, concluding that Montoya lied and [the Government] proceeded on a course to "fix" him.

Senior Circuit Judge Bright would therefore have reversed the convictions based on the government's vindictiveness. (The Opinion at 1303, J. Bright, dissenting.)

V.

THIS PETITION FOR CERTIORARI SHOULD BE GRANTED

A. The Opinion Creates A Split In The Circuits By Allowing The Government To Use Immunized Testimony To Decide To Prosecute An Immunized Witness

The Opinion creates a split with the Eight Circuit, which noted in United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973), that Kastigar v. United States, 406 U.S. 441 (1972) and the Fifth Amendment prohibits "all prosecutorial use of [immunized] testimony, not merely that which results in the presentation of evidence before the jury." Id. at 311. McDaniel, noted further, "[s]uch [non-evidentiary] use could conceivably include . . . deciding to initiate prosecution . . . ." Id. at 311.

The Opinion also creates a split with the Eleventh Circuit, which noted in United States v. Byrd, 765 F.2d 1524, 1530 (11th Cir. 1985), that Kastigar "made no mention of any burden on the Government to erect an impenetrable barrier between the prosecutors who hear or read the immunized testimony and those who decide to indict, even though the potential problem was an obvious one." (Emphasis added.) According to Byrd, "[a]t a minimum, the existence of independent evidence sufficient to establish probable cause to indict must be deemed to raise a presumption that the decision to indict was not tainted." Id. at 1530-31. (Emphasis added.) The Ninth Circuit in contrast, now allows the prosecution to taint the decision to indict by using immunized testimony in deciding whether that witness should be prosecuted.

There is also a split among the circuit courts of appeal on "whether Kastigar permits . . . 'non-evidentiary use of immunized testimony.'" See, United States v. Harris, 973 F.2d 333, 337 n.2 (4th Cir. 1992) (government may not alter

investigative strategy as a result of immunized statement); United States v. North, 910 F.2d 843, 856-60 (D.C.Cir.) (discussion of non-evidentiary use of immunized testimony), modified in part, 920 F.2d 940 (1990), cert. denied, 500 U.S. 941 (1991).

Also completely at odds with the Opinion is the United States Court of Military Appeals. In United States v. Olivero, 39 M.J. 246 (C.M.A. 1994), the United States Court of Military Appeals held, in a case almost identical to the one at bar, that Kastigar prohibits "using" immunized testimony to decide to prosecute the immunized witness and that a decision to prosecute based on immunized testimony violates Kastigar. Id. The holding of the United States Court of Military Appeals in Olivero has been repeated in United States v. Corcoran, 40 M.J.A. 478 (C.M.A. 1994) and United States v. McGeeney, 41 M.J.A. 544 (C.M.A. 1994).

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B. This Case Presents An Important Question Concerning The Scope Of This Court's Holding In Kastigar

The phrase "non-evidentiary use" never appears in Kastigar, where the Supreme Court simply held that the Fifth Amendment "prohibits the prosecutorial authorities from using the compelled testimony in any respect and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." 406 U.S. at 453. (Emphasis in original.) The plain meaning of "any" (emphasized by the Supreme Court) precludes what the Ninth Circuit now allows: A decision whether a witness should be prosecuted may be based solely on what the witness said while immunized.

The Supreme Court in Kastigar also noted the "total prohibition on use" of immunized testimony bars the "use" of that testimony as an "'investigatorial lead,' and also bar[s] the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." Kastigar at 460. (Citation

omitted.) Despite this explicit prohibition, United States v. Montoya now stands for the proposition that the government may use "immunized testimony as an investigatory lead in deciding to initiate prosecution . . . ." (Opinion at 1301, J. Bright dissenting.)

The Supreme Court in Kastigar noted further an immunity statute violates the Fifth Amendment if it "failed to protect a witness from future prosecution based on knowledge and sources of information obtained from the compelled testimony." Kastigar, 406 U.S. at 454, quoting Ullman v. United States, 350 U.S. 422, 437 (1956), (emphasis added by the Supreme Court in Kastigar). Because of the Opinion, § 6002 now violates the Fifth Amendment by failing to protect Mr. Montoya from prosecution based on the government's knowledge of what he said while immunized.

The Supreme Court has repeatedly held immunized testimony cannot be "used" in any way: Murphy v. Waterfront Commission of New York, 378 U.S. 52, 79 (1964) ("cannot be used in any manner");

Nix v. Williams, 467 U.S. 431, 442 (1984) (the Fifth and Sixth Amendments prohibit evidence that is discovered as "the fruit of unlawful police conduct . . . ."); Kastigar, supra, at 461 (". . . the compelled testimony can in no way lead to the infliction of criminal penalties."). Yet, the Ninth Circuit now allows immunized testimony to be used in deciding whether an individual should be prosecuted. (The Opinion at 1297.)

The proper application of Kastigar to the decision to prosecute is of critical importance. Even the Department of Justice could not have predicted the radical change the Opinion has made to Fifth Amendment law; the portion of McDaniel forbidding an indictment based on a review of immunized testimony is quoted in the United States Attorneys' Manual. United States Attorneys' Manual, Title 9, Section 23.400 (1990). The United States Attorneys' Manual also states before an immunized witness may be prosecuted, "the Government will also have to show that it has made no 'non-evidentiary' use of testimony or its fruits, such as a decision to focus on the witness

as a potential defendant." Id. at 9-23.330. (Emphasis added.)

The Opinion thus changes the assumptions of prosecutors and defense attorneys in the Ninth Circuit about the risks present in testifying under a grant of immunity. Because of the Opinion, hundreds of new prosecutions may result in the Ninth Circuit as prosecutors realize they have free reign to immunize witnesses before the grand jury, and then to make their decision to prosecute based on their firsthand, private, under oath interview of that potential defendant. The Opinion thus drastically alters the nature of the representation and prosecution of grand jury witnesses. It is such an aberrant departure from previous case law that it is a de facto reversal of Kastigar and § 6002, and this petition for certiorari should be granted.

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C. The Opinion Sets A Dangerous Precedent When It Allows The Government To Punish Mr. Montoya And, "For Extra Measure," Mrs. Montoya Based On Evidence That Could Not Be Used To Prosecute Him For Perjury

The Opinion concludes, without analysis, that "the presumption of vindictiveness did not arise in this case" (citations omitted). As noted by the Dissent, the government "did not have enough proof to proceed with perjury charges so [it] obviously decided to punish Mr. Montoya with using the information the government always had to prosecute him, and then, for extra measure, proceeding to recommend prosecution of Mrs. Montoya." (The Opinion at 1303, J. Bright, dissenting.) As noted by the Dissent, "the evidence in the record indicates a realistic likelihood of personal pique and personal frustration which gives rise to a presumption of prosecutorial vindictiveness." Id.

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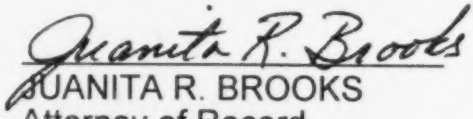
VI.

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

DATED: May 30, 1995 McKENNA & CUNEO



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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ROSARIO MONTOYA, *Defendant-Appellant.*	No. 93-50411 D.C. No. CR-92-0572-GT
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. FILIBERTO E. MONTOYA, *Defendant-Appellant.*	No. 93-50440 D.C. No. CR-92-0572-GT OPINION

Appeals from the United States District Court
for the Southern District of California
Gordon Thompson, Jr., District Judge, Presiding

Argued and Submitted
March 9, 1994—Pasadena, California

Filed January 12, 1995

Before: Myron H. Bright,* Charles Wiggins,
and Thomas G. Nelson, Circuit Judges.

Opinion by Judge T.G. Nelson;
Dissent by Senior Circuit Judge Bright

*Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

SUMMARY

Criminal Law and Procedure/Immunity/ Defendants and Accused, Rights of

The court of appeals affirmed a district court judgment of conviction. The court held that a claimed relationship between a defendant's immunized testimony and the decision to prosecute him was too tenuous and remote from the criminal proceeding against the defendant to constitute a non-evidentiary use of immunized testimony against him.

After the government became aware that certain San Diego County real properties were connected with the Contreras-Subias drug trafficking organization, Assistant United States Attorney (AUSA) Warren Reese was assigned to investigate the trafficking activities of the organization (the Reese investigation). Documents obtained as a result of the arrests of members of the organization and from searches of the properties led to materials indicating that appellant Filiberto Montoya (Montoya) was involved. Montoya had acted as a real estate salesperson in transactions whereby members of the organization, or its nominees, acquired real property.

A separate investigation revealed that Montoya was involved, on behalf of the Contreras family, in a real estate transaction in Oklahoma. This led to indictments of members of the drug organization for money laundering in Oklahoma, and Reese was assigned to assist in the prosecution.

Reese wrote a letter granting Montoya informal immunity, and Montoya was interviewed. Montoya was formally granted immunity and ordered to testify before the grand jury in San Diego and at the Oklahoma trial.

Reese prepared a memorandum to the United States Attorney requesting that authority be sought from the Department of Justice to prosecute Montoya for conspiracy to commit

bank and mail fraud and money laundering, as well as the substantive offenses. Reese's request explained that Montoya appeared to testify falsely before the grand jury and during a trial, and did not give complete testimony. Permission was granted by the Attorney General (AG), and AUSA Ed Weiner was assigned to prosecute Montoya (the Weiner investigation). Montoya and his wife, appellant Rosario Montoya, were indicted for conspiracy to engage in money laundering and bank fraud, and for the underlying substantive offenses.

The Montoyas filed a motion to dismiss the indictment on the ground it was tainted by immunized testimony. The government filed a response, including nine declarations of the various prosecutors and agents involved in the Reese and Weiner investigations. The declaration of Agent Chavez, who was involved in the Reese investigation, described the execution of search warrants of Montoya's properties before Montoya was first interviewed. Chavez's declaration also provided a detailed time-line for each step he took in the investigation. The declaration of Agent Gauthier, who was involved in the Reese investigation and who later accompanied an agent of the Weiner investigation team on interviews, stated that he never reviewed reports of Montoya's interview or transcripts of his testimony.

The Montoyas filed a motion to cross-examine the nine declarants after the court indicated that it might not hold a hearing on the motion (a *Kastigar* evidentiary hearing). The district court denied the motion to dismiss the indictment and the motion to cross-examine, finding that the government "met its heavy burden of proof that it obtained the evidence used to indict Montoya from independent sources."

The district court granted a motion for reconsideration and again denied the motion to dismiss. The court also denied a separate motion filed by the Montoyas, requesting that the court dismiss the indictment based on outrageous government

conduct and vindictive prosecution, and requesting that an evidentiary hearing be held.

The Montoyas entered conditional guilty pleas, preserving their right to appeal the district court's denial of the motion to dismiss the indictment. The Montoyas appealed their convictions, contending that the prosecution was tainted because of improper use of Montoya's immunized statements and testimony in violation of his Fifth Amendment right against self-incrimination.

[1] Chavez's declaration contained a detailed time-line and tracing of the investigation, based on information and leads obtained in the search warrants executed before Montoya received informal immunity. Montoya's attack on his declaration did not address the detailed independent sources of information obtained in Chavez's investigation. [2] Gauthier was never exposed to Montoya's immunized testimony. The fact that he attended a number of witness interviews with a member of the Weiner investigation team did not demonstrate that the immunized testimony was in any way used to build a case against Montoya. [3] In regard to Reese, Montoya advanced nothing but the most tangential link between the questioning of a witness before the grand jury in the Contreras-Subias investigation and the thought processes of Reese during the questioning. The facts did not give rise to taint or reveal a lack of an independent source for all of the government's evidence against the Montoyas. [4] Thus, there was no clear error in the district court's findings that the government proved independent sources for all of its evidence against Montoya. Despite the Montoyas' focus on "overlap" and alleged exposure to immunized testimony, the nine detailed declarations filed by the government established that the indictment rested entirely on sources independent of Montoya's immunized testimony. The district court's finding that there was no evidentiary use of Montoya's immunized statements and testimony was not clearly erroneous.

[5] Montoya argued that the most glaring use of his immunized testimony was the non-evidentiary use of it in deciding to prosecute him and his wife. He argued that Reese used his immunized testimony in the application for permission to prosecute him. [6] However, Montoya's claimed relationship between his immunized testimony and the decision to prosecute was too tenuous and remote. Reese was not preparing the indictment, he was seeking the approval of the AG to prosecute Montoya. Reese was following internal procedures which required him to submit a request for authorization to prosecute and to obtain the AG's express written authorization before prosecution could be initiated. [7] Reese's application for permission to prosecute Montoya did not contain a summary or complete overview of Montoya's grand jury or trial testimony. Rather, the application described two incidents involving Montoya's testimony which led the government to believe Montoya was not being completely cooperative or candid. [8] This information was clearly included to demonstrate why prosecution of Montoya was justified. [9] Reese needed to communicate to his superiors the unusual circumstances justifying prosecution. This could not be done by simply reciting the nontestimonial evidence against Montoya. Thus, Reese's involvement in requesting permission to prosecute was too remote from the criminal proceeding against Montoya to constitute non-evidentiary use of the immunized testimony against him. [10] The report prepared or relied upon by Weiner, describing how Reese was convinced Montoya was not being truthful, did not involve improper use of immunized testimony.

[11] The Montoyas also contended that the district court's refusal to grant a *Kastigar* hearing involving cross-examination of the government's declarants deprived them of their right to procedural due process and their right to confront the witnesses against them. [12] However, a hearing was unnecessary because no issues were left to resolve. The declarations filed by the government were exhaustive, detailed, nonconclusory in form, and uncontradicted. [13] To

the extent that the Montoyas suggested that the government's declarations were contrived, false, or even tainted, the Montoyas' argument was rejected. **[14]** Alleged internal inconsistencies in the declarations did not call into question the government's proof by a preponderance of the evidence that all evidence utilized in the indictment of the Montoyas was obtained from independent sources and that the Weiner prosecution team had no access to the immunized testimony.

[15] The Montoyas were incorrect in contending that the district court should have dismissed the indictment because it was based on outrageous government conduct and vindictive prosecution due to the government's dissatisfaction with Montoya's immunized testimony. **[16]** A presumption of vindictiveness did not arise in this case. **[17]** There was no evidence in this case that would satisfy the "extremely high" burden to establish a claim of outrageous government conduct.

Senior Circuit Judge Bright dissented, stating that the prosecutors improperly used Montoya's immunized testimony to initiate a case against the Montoyas. In addition, the evidence indicated a realistic likelihood of personal pique and personal frustration which gives rise to a presumption of prosecutorial vindictiveness.

COUNSEL

Juanita R. Brooks, McKenna & Cuneo, San Diego, California; Paul E. Potter, Potter, Cohen & Samulon, Pasadena, California, for the defendants-appellants.

Edward J. Weiner, Assistant United States Attorney, San Diego, California, for the plaintiff-appellee.

OPINION

T.G. NELSON, Circuit Judge:

I.

OVERVIEW

This case involves the prosecution of a formerly immunized witness and his wife. Filiberto Montoya is a real estate salesperson who was accused of laundering money for alien drug lords by making investments in local real estate. Montoya appeals his conviction following his conditional guilty plea to conspiracy to engage in monetary transactions in property derived from specified unlawful activity and to commit bank fraud, in violation of 18 U.S.C. §§ 371, 1957(a), and 1344. Rosario Montoya appeals her conviction following her conditional guilty plea to making a false statement on a loan application and aiding and abetting, in violation of 18 U.S.C. § 1014, 18 U.S.C. § 2. The Montoyas' conditional guilty pleas preserved the right to appeal the district court's denial of the motion to dismiss the indictment on the ground that this prosecution is allegedly tainted by Filiberto's status as an immunized witness in a drug investigation focusing on the Contreras-Subias drug organization. We conclude that the district court properly denied the motion to dismiss the indictment on the ground that it was not tainted by the earlier grant of immunity to Montoya; that a *Kastigar* evidentiary hearing was not compelled under the circumstances of this case; and that the district court did not err in refusing to dismiss the indictment on grounds that it was not the result of outrageous government conduct or prosecutorial vindictiveness.

II.

FACTS AND PROCEDURAL HISTORY

In May 1988, the Government became aware that a number of real properties in San Diego County were connected with

the Contreras-Subias drug trafficking organization. Assistant United States Attorney (AUSA) Warren Reese was assigned to investigate the trafficking activities of this organization (the "Reese investigation"). Early in the investigation, documents obtained as the result of the arrests of members of the Contreras-Subias organization and from searches of the San Diego properties, led to materials indicating that Filiberto Montoya was involved. Montoya had acted as a real estate salesperson in transactions whereby members of the organization, or its nominees, acquired real property. From May through August 1988, documents were collected as a result of the issuance of grand jury and administrative subpoenas.

A separate investigation revealed that Montoya was involved, on behalf of the Contreras family, in a real estate transaction in Oklahoma. This led to indictments of members of the drug organization for money laundering in Oklahoma, and AUSA Reese was assigned to assist in this prosecution.

In the Fall of 1988, Reese was contacted by an attorney on behalf of Montoya, and they discussed the possibility of Montoya cooperating in the investigation. Reese wrote a letter dated November 17, 1988, granting Montoya informal immunity. The first interview with Montoya took place on November 18, 1988. He was also interviewed in January, February, and May of 1989. Discussions with Montoya led Reese to conclude that Montoya would be called as a witness. Montoya was formally granted immunity and ordered to testify before the grand jury in San Diego in January 1989, and at the Oklahoma trial in May 1989.

In February 1990, Reese prepared a memorandum to the United States Attorney requesting that authority be sought from the Department of Justice to prosecute Montoya for conspiracy to commit bank and mail fraud and money laundering, as well as the substantive offenses. Reese's request explained:

> In weighing the public interest in prosecution, it should be noted that the witness appeared to testify

> falsely before the grand jury, then recanted when confronted with contradictory evidence. He is also believed to have testified falsely during a trial (although a perjury prosecution could not be sustained), and he did not give complete testimony, as explained below.

Permission was ultimately granted by the Attorney General, and AUSA Amalia Meza, then AUSA Ed Weiner, were assigned to prosecute Montoya (the "Weiner investigation").[1] The Montoyas were indicted on May 7, 1992, for conspiracy to engage in money laundering and bank fraud, and for the underlying substantive offenses.

The Montoyas filed a motion to dismiss the indictment on the ground it was tainted by immunized testimony. The Government filed a response, including nine declarations of the various prosecutors and agents involved in the Reese and Weiner investigations. The Montoyas subsequently filed a motion to cross-examine the nine declarants after the court indicated that it might not hold a hearing on the motion (a *Kastigar* evidentiary hearing).

The district court denied the motion to dismiss the indictment and the motion to cross-examine on November 30, 1992. The court found that "[t]he government, in its response and opposition, met its heavy burden of proof that it obtained the evidence used to indict Montoya from independent sources." The court concluded:

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[1]Meza took over for Reese after Reese had requested permission to prosecute Montoya, because of Reese's exposure to Montoya's immunized statements and testimony. Meza participated in the Montoya investigation from approximately May 1990 to July 1991. In July 1991, Meza was assigned to another project, and turned the investigation over to Weiner.

> There was some overlap between the Reese investigation and the Weiner investigation, as the defense contends. However, the Government must prove that it had prior independent sources for the information that lead to Montoya's indictment, not that there was no overlap. The searches of Montoya's property in August of 1988, the subpoenas for records from escrow companies and financial institutions as a result of these searches, and the separate investigations of Agents Morris, Young and Grover all indicate that the Government had more than enough independent evidence to indict Montoya.

Instead of filing a motion for reconsideration, the Montoyas petitioned the Ninth Circuit for a writ of mandamus to compel the district court to vacate its order, conduct a hearing on the motion, including cross-examination of the nine declarants, and file discovery documents.[2] The Government filed a motion for reconsideration with the district court, requesting that it permit filing of the discovery material, review the material, and reconsider the motion to dismiss. The court granted the motion and reconsidered the motion to dismiss in light of the new material.

On February 2, 1993, the court again denied the motion to dismiss. The court noted that the discovery documents "actually support the Government's assertion that the evidence used to indict Montoya was derived from independent sources," and then described the documents. The court rejected the Montoyas' argument that the discovery documents were inconsistent with the declarations filed by the Government and that therefore an evidentiary hearing was required. The court explained:

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[2]On the day of the hearing on the motion to dismiss, the Montoyas attempted to file voluminous discovery documents at the judge's chambers. The court refused to allow the documents to be filed because they were late.

> The defendants point out that certain declarations state that the declarants did not have information about Montoya's immunized statements or testimony. But reports, by the declarants, make reference to the fact that the Government believed Montoya's testimony before the grand jury and in Oklahoma to be untruthful. The defense seems to argue that this means the declarant had knowledge of the contents of Montoya's statements and testimony. A closer reading of the reports, however, reveals that the declarants are just reiterating a generalized opinion that the Government believed Montoya lied to the grand jury. Nowhere in the voluminous documents submitted to the court are there implications that the declarants, which swore they had no knowledge of Montoya's statement or testimony, knew the content of Montoya's statements or testimony. Importantly, absent such a contradiction, there is no need for an evidentiary hearing.

The district court also denied a separate motion filed by the defendants, requesting that the court dismiss the indictment based on outrageous government conduct and vindictive prosecution, and requesting that an evidentiary hearing be held.

Subsequently, the Montoyas entered conditional guilty pleas,[3] preserving their right to appeal the court's denial of the motion to dismiss the indictment, "based on the contention that information obtained from Filiberto E. Montoya while he was an immunized witness in an earlier investigation so tainted the instant case as to require a dismissal." Filiberto Montoya was sentenced to forty-one months of incarceration and three years of supervised release. The court suspended Rosario Montoya's two-year sentence and placed her on three

[3]On February 8, 1993, the Government filed a superseding information against Rosario Montoya, to which she entered a conditional plea of guilty.

years of supervised probation. The Montoyas timely appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291.

III.

STANDARD OF REVIEW

"We review under the clearly erroneous standard the district court's finding that the government's evidence was untainted by a grant of immunity." *United States v. Lipkis*, 770 F.2d 1447, 1450 (9th Cir. 1985). The district court's denial of a motion for an evidentiary hearing is reviewed for an abuse of discretion. *See United States v. Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991). The standard of review for vindictive prosecution is unsettled in the Ninth Circuit. The court has variously applied abuse of discretion, clearly erroneous, and *de novo* standards. *See United States v. Garza-Juarez*, 992 F.2d 896, 903 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 724 (1994). The district court's refusal to dismiss the indictments on the basis that the government's conduct was not outrageous is reviewed *de novo*. *United States v. Solorio*, 37 F.3d 454, 457 (9th Cir. 1994).

IV.

DISCUSSION

A. Immunized Testimony

The Montoyas argue that this prosecution is tainted because of improper use of Filiberto Montoya's immunized statements and testimony in violation of his Fifth Amendment right against self-incrimination.[4] *See Kastigar v. United States*, 406

[4]The Government argues that Rosario Montoya lacks standing to appeal on the basis of her husband's assertion of constitutional rights. However, the Government has specifically agreed that should Filiberto Montoya prevail in his arguments that his immunity was breached, that Rosario will also receive a dismissal. Therefore, we need not address the standing argument.

U.S. 441 (1972). In *Kastigar*, the Supreme Court upheld the constitutionality of the federal witness use immunity statute, 18 U.S.C. § 6002, and held that a prosecution of a previously immunized witness is allowable, but emphasized that "[t]he statute provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom." *Id.* at 460; *see also id.* at 453.

The use immunity statute provides in relevant part that:

> [N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6002. The statute thus provides use and derivative use immunity, which "grants immunity from the use of the compelled testimony and evidence derived therefrom."[5] *Block v. Consino*, 535 F.2d 1165, 1167 n.3 (9th Cir.), *cert. denied*, 429 U.S. 861 (1976). "[S]uch immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination." *Kastigar*, 406 U.S. at 453. "The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted." *Id.* "Use immunity does not protect the substance of compelled testimony, it only protects against the use of compulsory testimony as a source of evidence." *United States v. Crowson*, 828 F.2d 1427, 1428-29 (9th Cir. 1987) (internal quotation omitted), *cert. denied*, 488 U.S. 831 (1988).

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[5]Transactional immunity, on the other hand, "is full immunity from prosecution for any offense to which the testimony relates." *United States v. Plummer*, 941 F.2d 799, 803 (9th Cir. 1991).

A person compelled to testify against himself under a grant of immunity need only show that he testified in order "to shift to the government 'the heavy burden' of proving an independent source for all its evidence." *United States v. Mapelli*, 971 F.2d 284, 288 (9th Cir. 1992) (citing *Kastigar*, 406 U.S. at 461). "This burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Kastigar*, 406 U.S. at 461; *see also United States v. Koon*, 34 F.3d 1416, 1432 (9th Cir. 1994); *Crowson*, 828 F.2d at 1429. "[A] good faith allegation that the evidence is not the fruit of the immunized testimony is not sufficient; the Government must show how it acquired all of the evidence." *Block*, 535 F.2d at 1169. "The government must prove the independent source by a preponderance of the evidence, and we will uphold a district court's findings unless clearly erroneous. This court has permitted the government to meet its burden of proof as to the existence of independent, prior sources through affidavits." *Crowson*, 828 F.2d at 1429 (citation omitted).[6]

"[T]here is no *per se* rule requiring the withdrawal of a prosecutor or other government official who may have been exposed to immunized testimony." *Id.* at 1430; *see also Mapelli*, 971 F.2d at 287. If the prosecution team has been exposed to the immunized testimony, the Government may still use the evidence if it meets its burden of proof that the evidence is derived from independent sources. *Crowson*, 828 F.2d at 1430; *Mapelli*, 971 F.2d at 287-88. The question "is not whether the prosecutor was aware of the contents of the

[6]As the Court of Appeals for the District of Columbia has observed, "the *Kastigar* burden is 'heavy' not because of the evidentiary standard, but because of the constitutional standard: the government has to meet its proof only by a preponderance of the evidence, but *any* failure to meet that standard must result in exclusion of the testimony." *United States v. North*, 910 F.2d 843, 873, *modified*, 920 F.2d 940 (D.C. Cir. 1990) (en banc), *cert. denied*, 500 U.S. 941 (1991).

immunized testimony, but whether he used the testimony in any way to build a case against the defendant." *Crowson*, 828 F.2d at 1430 (internal quotation omitted). The Government may protect "against a claim of indirect use by assigning the case to others not exposed and barring communication between them and the prosecutors who obtained the compelled testimony." *Mapelli*, 971 F.2d at 288; *see also Crowson*, 828 F.2d at 1429-30.

1. Alleged evidentiary use of the immunized statements and testimony.

The district court found that the Government obtained the evidence used to indict Montoya from independent sources. Contrary to the Montoyas' portrayal of the district court's order, the district court did find there was some overlap between the Reese and the Weiner investigations. As the district court correctly observed, however, the Government is not required to show that there was no overlap, but that "all of the evidence it proposes to use was derived from legitimate independent sources." *Kastigar*, 406 U.S. at 461-62; *see also Koon*, 34 F.3d at 1432. Simply arguing that the investigations overlapped does not answer the question of the existence of legitimate independent sources for all of the evidence. Montoya's attack on the declarations of Agent Roman Chavez, Agent David Gauthier, and AUSA Reese therefore misses the mark. *Even if* agents and prosecutors actually participated in both investigations, and/or were exposed to immunized testimony, there is no *per se* rule requiring their withdrawal from the case. *Crowson*, 828 F.2d at 1430. The focus of the inquiry under *Kastigar* is whether the immunized testimony was in any way used to build a case against Montoya. *Id.* With this focus in mind, we address the Montoyas' specific complaints concerning the Government's attempt to meet its burden of proof in this case.

a. Agent Chavez's declaration.

Agent Chavez was involved in the Reese investigation, and his declaration describes the execution of the search warrants of Montoya's properties in May and August 1988 (before Montoya was first interviewed in November 1988). As the district court observed, Chavez recited in great detail the documents and leads found as a result of these searches, as well as the resulting subpoenas issued to financial institutions. Contrary to Montoya's characterization, nowhere does Chavez state in his declaration that he was involved in both the Reese and Weiner investigations.[7] While Chavez investigated the purchase and acquisition of the properties with which the Montoya prosecution was concerned, it was done as part of the Contreras prosecution, and the evidence and resulting leads were obtained before Montoya was first interviewed.

Chavez states in his declaration that "the majority of financial leads that I pursued had already been obtained prior to any contact with Filiberto Montoya." Chavez provides a detailed time-line for each step he took in the investigation. He lists seven investigatory actions (interviews, conversations and issuance of a subpoena) taken after the November 18, 1988, interview of Montoya, but ties each one to a lead obtained well before that date.

[7]Counsel for Rosario Montoya stated at oral argument that Agent Chavez participated in both investigations. In their motion to dismiss the indictment, the Montoyas noted that Agent Chavez is listed on the "case initiation" as an agent involved in the Weiner investigation. Even if we assume that Agent Chavez was involved in both investigations, his declaration ties all of his investigative leads back to a time prior to the first interview of Montoya. Furthermore, it also details how Chavez segregated and sealed all documents "having anything to do with interviews with Filiberto Montoya conducted by the case agent" prior to his turning the case file over to Agent Young of the Weiner investigation team in October 1990.

[1] While Chavez's declaration does contain the conclusory statement that "[a]t no time did I ever use any information provided by Filiberto Montoya in pursuing leads associated with the Contreras-Subias investigation," it also contains much more than this: a detailed time-line and tracing of the investigation, based on information and leads obtained in the search warrants executed before Montoya received informal immunity. Montoya's attack on this declaration does not address the detailed independent sources of information obtained in Chavez's investigation. Chavez's declaration was not "limited to a negation of taint." *See Kastigar*, 406 U.S. at 460.

b. Agent Gauthier's declaration.

As the district court specifically noted in its synopsis of the declarations, Agent Gauthier was involved in the Reese investigation, but also later accompanied Agent Morris of the Weiner investigation team when she interviewed witnesses involved in the real property transactions. The Montoyas contend that this demonstrates "overlap" and therefore establishes taint. However, Gauthier's declaration states that he "never interviewed Montoya or his wife," "never reviewed or discussed any reports of [the] interview of Montoya or transcripts of his testimony," and had not had anyone "impart[ ] to [him] any information purportedly derived from Montoya's statements." Furthermore, Gauthier explained his motivation to accompany Agent Morris as follows:

> In July and November 1989 I accompanied Agent Linda Morris in a number of interviews of witnesses involved in certain real estate transactions she was investigating. Agent Morris did most of the questioning. I was motivated to accompany her by the hope that I could obtain information concerning drug trafficking suspects whose whereabouts remained unknown to us at the time.

Agent Morris explained in her declaration that sometime after May 19, 1989, she told Agent Gauthier of her findings involving the Montoyas and two businesses, and Gauthier informed her that in August 1988, search warrants had been served on the businesses and two properties belonging to Montoya. Gauthier did not mention that Montoya had been interviewed. Morris confirmed that she and Gauthier interviewed a number of people identified with the property transactions in question, but also stated that she had "never been given any information by anyone concerning Montoya's interviews and testimony."[8]

[2] Agent Gauthier was never exposed to Montoya's immunized testimony. The fact that this Reese investigation team member attended a number of witness interviews with a member of the Weiner investigation team does not demonstrate that the immunized testimony was in any way used to build a case against Montoya. *See Crowson*, 828 F.2d at 1430.

c. The Reese declaration.

The Montoyas argue that AUSA Reese's declaration reveals that even after Montoya's testimony at the Oklahoma trial, Reese continued his investigation of Montoya by calling Roberto Guerra before the grand jury and questioning him regarding a Tuscon real estate deal involving Montoya. They then take issue with Reese's declaration statements that he "did not rely on any information [he] obtained from Montoya to compose questions to Guerra," but instead used an investigative report reflecting interviews conducted by Agents Gauthier and Morris.

[8]According to the declaration of AUSA Reese, at some point near the end of 1989, Reese informed Morris that "it was essential that the case [against Montoya] be based on evidence obtained totally independently of any information obtained from Montoya himself," in light of his immunized status.

[3] Guerra was called before the grand jury not as part of an investigation of Montoya, but during the course of an additional investigation of the Contreras drug organization. A superseding indictment in the Contreras case was returned thereafter in September 1989. Independent investigation had disclosed that Guerra, who was an acquaintance of Montoya, was the nominal purchaser of the Arizona property, but that the beneficial owner was a Contreras. Montoya advances nothing but the most tangential link between the questioning of Guerra in the Contreras-Subias investigation and the thought processes of Reese during the questioning. More importantly, these facts do not give rise to taint or reveal a lack of an independent source for all of the Government's evidence against the Montoyas.

Montoya next attacks Reese's failure to follow Department of Justice guidelines concerning the preservation of the ability to indict an immunized witness. He cites the failure to prepare a signed and dated memo summarizing the evidence concerning Montoya prior to his interview and testimony; the failure to ensure all of his testimony was recorded verbatim and maintained in a secure, restricted access location; and failure to maintain a record of subsequently received evidence against him.

However, failure to strictly comply with the United States Attorneys' Manual creates no enforceable rights. *United States v. Lorenzo*, 995 F.2d 1448, 1453 (9th Cir.), *cert. denied*, 114 S. Ct. 225 (1993). The lack of a memorandum of evidence available to charge Montoya as of November 17, 1988, made more work for the Government in this case; however, it was still able to create an adequate history of what information was obtained through which of the various sources and at what time. The Government showed the Weiner prosecution team was aware of the immunity problem

and followed reliable procedures for segregating the immunized testimony.[9]

d. Conclusion.

[4] The district court made the proper inquiry in this case, and we find no clear error in its findings that the government proved independent sources for all of its evidence against Montoya. The Montoyas' focus on "overlap" and alleged exposure to immunized testimony does not answer the question that we must ask in deciding this appeal. The nine detailed declarations filed by the Government establish that the indictment rested entirely on sources independent of Montoya's immunized testimony. We are satisfied that the district court's finding that there was no evidentiary use of Montoya's immunized statements and testimony was not clearly erroneous.

2. Alleged non-evidentiary use of the immunized statements and testimony.

[5] Montoya argues that the most glaring use of his immunized testimony was the non-evidentiary use of it in deciding to prosecute him and his wife. First, he argues that Reese used Montoya's immunized testimony in his application for permission to prosecute Montoya. Next, he argues this taint was compounded when AUSA Meza saw this application. Finally, Montoya points to a report/document "either prepared by or definitely used by" AUSA Weiner in the prosecution of the Montoyas, which states that Reese had been "convinced that Montoya was not being truthful and Mr. Reese submitted his

[9]The transcripts of Montoya's grand jury and trial testimony were not made available to the Weiner team investigators. The transcripts and reports of interviews with Montoya after immunity was conferred were collected and sealed. A different Assistant United States Attorney was assigned to prosecute the case so that he would be isolated from the immunized testimony and the interviews with Montoya.

request to prosecute Montoya to the Attorney General . . . [who later] approved the prosecution."

Non-evidentiary use of immunized testimony could include the decision to prosecute an immunized witness. *Crowson*, 828 F.2d at 1430. *Kastigar* did not expressly discuss the propriety of non-evidentiary use. *See Kastigar*, 406 U.S. at 453, 460. In *Crowson*, we assumed that non-evidentiary use was prohibited. *Crowson*, 828 F.2d at 1430 ("A more difficult question is what proof or procedures the government must employ to carry its burden of showing that it made no *non-evidentiary* use of the immunized testimony."). *Compare United States v. North*, 910 F.2d 843, 856 (assuming without deciding that a prosecutor cannot make non-evidentiary use of immunized testimony), *modified*, 920 F.2d 940 (D.C. Cir. 1990) (en banc), *cert. denied*, 500 U.S. 941 (1991); *and United States v. Byrd*, 765 F.2d 1524, 1531 (11th Cir. 1985) ("It is our view that the privilege against self-incrimination is concerned with direct and indirect *evidentiary* uses of compelled testimony and not with the exercise of prosecutorial discretion."). *Crowson* did not answer the question of whether or not the Government meets its burden of showing no non-evidentiary use by establishing prior, independent sources for all of the evidence because there were "other indications that the government did not indirectly use [the immunized] testimony for non-evidentiary purposes despite its admitted access to that testimony." *Crowson*, 828 F.2d at 1431.

As pointed out above, this circuit has not specifically decided whether non-evidentiary use comes within the prohibition of the statute. We need not decide that general issue in this case, either, but will assume that some non-evidentiary uses could come within the ban of the statute.

Section 6002 does not prohibit all use of immunized testimony. It proscribes its direct or indirect use *against* the witness. 18 U.S.C. § 6002.

[6] Montoya's claimed relationship between his immunized testimony and the decision to prosecute is too tenuous and remote. AUSA Reese was not preparing the indictment, he was seeking the approval of the Attorney General to prosecute Montoya. Reese was following internal procedures which required him to submit a request for authorization to prosecute and to obtain the express written authorization of the Attorney General before prosecution could be initiated. *See* United States Attorneys' Manual, Title 9, Section 23.400 (1990). As part of the departmental policy, Reese was to submit a memorandum indicating:

> (a) the unusual circumstances which justify prosecution, (b) the method by which he/she will affirmatively establish either that all evidence necessary for a conviction was in the hands of the government prior to the date of the defendant's compelled testimony or that it came from sources independent of the witness's testimony and was not the result of focusing an investigation on the witness because of compelled disclosures, and (c) how he/she will show affirmatively that no other "non-evidentiary" use has been or will be made of the compelled testimony in connection with the proposed prosecution (for example, by having the prosecution handled by an attorney unfamiliar with the substance of the compelled testimony).

Id. Assistant United States Attorneys are instructed that,

> [i]n weighing the public interest in prosecuting a person for an offense first disclosed in, or closely related to, his/her compelled testimony, the attorney for the government should take into account, *inter alia*, the importance of encouraging free and full disclosure by witnesses whose testimony is compelled. He/she should also take into account the extent to which the potential defendant had testified freely and

> fully in compliance with the order. . . . [L]ess than complete testimony should not appear to be rewarded by a declination of prosection in a case where independent evidence clearly exists and the situation otherwise warrants prosecution.

Id.

[7] Reese's application for permission to prosecute Montoya does not contain a summary or complete overview of Montoya's grand jury or trial testimony. It does not detail the real estate transactions that were later used in the instant indictment. Rather, the application describes two incidents involving Montoya's testimony which led the Government to believe Montoya was not being completely cooperative or candid. First, before the grand jury Montoya initially denied knowledge concerning the leader of the drug organization. The memorandum then details why it was believed that Montoya deliberately withheld information about his acquaintance with the drug ring leader, thus prompting the suspicion that Montoya would tell the Government only what he believed was already known. Second, while testifying at the Oklahoma trial, Montoya effectively denied knowledge of certain summaries of expenses of the properties which had been found during the course of the investigation. Apparently, Montoya had previously given the Government more information about the realities underlying preparation of the summaries, which tended to demonstrate management and control of the properties by the Contreras family, rather than the nominal owners. Reese characterized Montoya's trial testimony as thus becoming "essentially neutral."

[8] This information was clearly included to demonstrate why prosecution of Montoya was justified. Reese explained that "[i]n sum, it appears that immunity has not encouraged complete testimony from Montoya and he should not be rewarded by declining prosecution where independent evidence exists, and the situation otherwise warrants

prosecution." While this memorandum does contain a one paragraph, basic overview of the Montoyas' scheme, the memo then goes on to detail the independent sources of evidence necessary to prosecute Montoya.

As the DOJ instructions point out, there is a public interest component to the decision to prosecute an immunized witness. The Government is interested in "encouraging free and full disclosure." Thus, the AUSA is exhorted to consider "the extent to which the potential defendant had testified freely and fully in compliance with the order." But after considering these factors, "less than complete testimony should not appear to be rewarded. . . ."

The requirement of a showing to the Attorney General that sufficient independent evidence exists to support a prosecution addresses the question of whether a witness *could* be successfully prosecuted. Absent some analysis of the witness's actual testimony and how it squares with what the Government knew of the ability of the witness to say more, there would be no analysis of whether there *should* be a prosecution. In addition to constraining the Attorney General's exercise of her discretion, a rule that foreclosed her consideration of whether a prosecution *should* take place would not be in the best interest of immunized witnesses in general, and contrary to the public interest identified in the DOJ manual.

[9] Reese needed to communicate to his superiors the unusual circumstances justifying prosecution. *Cf. Byrd*, 765 F.2d at 1530 ("*Kastigar* made no mention of any burden on the government to erect an impenetrable barrier between the prosecutors who hear or read the immunized testimony and those who decide to indict, even though the potential problem was an obvious one."). This could not be done by simply reciting the nontestimonial evidence against Montoya. We conclude that Reese's involvement in requesting permission to prosecute was too remote from the criminal proceeding

against Montoya to constitute non-evidentiary use of the immunized testimony against him.

The fact that AUSA Meza read the application for permission to prosecute, even if it had contained an actual summary of Montoya's testimony, would not mean she would have had to withdraw from participation in the case. *See Crowson*, 828 F.2d at 1430. Nor does it demonstrate anything other than a remote and tenuous connection to the decision to initiate a prosecution against Montoya. That Meza read the application does not demonstrate that the Government made non-evidentiary use of Montoya's immunized testimony.

[10] The report prepared or relied upon by AUSA Weiner, describing how Reese was convinced Montoya was not being truthful, did not involve improper use of immunized testimony. As the district court pointed out, the various reports in the Montoya case "are just reiterating a generalized opinion that the Government believed Montoya lied to the grand jury." This does not in any way indicate that Weiner had access to the contents of Montoya's statements and testimony. Without significant exposure, Meza and Weiner "could not have made significant nonevidentiary use, permissible or impermissible." *See North*, 910 F.2d at 860.

B. The Denial of a Kastigar Hearing

[11] The Montoyas argue alternatively that if their indictments are not dismissed on the basis of improper use of immunized testimony, or because of vindictive prosecution or outrageous government conduct (discussed below), their case should be remanded for a full *Kastigar* hearing. They contend that the district court's refusal to grant a *Kastigar* hearing involving cross-examination of the Government's declarants deprived them of their right to procedural due process and their right to confront the witnesses against them. After considering the additional discovery material provided by the Montoyas, the district court stated:

> Nowhere in the voluminous documents submitted to the court are there implications that the declarants, which swore they had no knowledge of Montoya's statement or testimony, knew the content of Montoya's statements or testimony. *Importantly, absent such a contradiction, there is no need for an evidentiary hearing.*

While ordinarily the district court should hold a *Kastigar* evidentiary hearing, *see Trimiew v. United States*, 9 F.3d 1388, 1390 (9th Cir. 1993), the Government may meet its *Kastigar* burden of proof as to the existence of independent, prior sources through affidavits. *Crowson*, 828 F.2d at 1429 (citing *United States v. Rogers*, 722 F.2d 557, 560 (9th Cir. 1983) ("exhaustive" sworn declarations), *cert. denied*, 469 U.S. 835 (1984)).

In *United States v. Zielezinski*, 740 F.2d 727, 734 (9th Cir. 1984), we held that when the same grand jury that hears a person's immunized testimony then indicts the person, a *Kastigar*-style hearing is necessary to determine the independent grounds for the indictment. "Even if proper, such an indictment *appears* tainted." *Lipkis*, 770 F.2d at 1451 (citing *Zielezinski*, 740 F.2d at 733). On the other hand, in *Lipkis*, we held that a *Kastigar* hearing was not compelled once the defendant stipulated that there were only minimal differences between his nonimmunized and immunized statements. We held that "a subsequent hearing would have served no purpose" and "was unnecessary because no issues were left to resolve." *Id.*

[12] Although the Montoyas cite *Zielezinski* for the proposition that a *Kastigar* hearing is mandated, their case differs factually because Filiberto Montoya was not indicted by the same grand jury that heard his immunized testimony.[10] Fur-

[10]The Montoyas also cite *United States v. North*, 920 F.2d 940, 943 (D.C. Cir. 1990) (en banc) ("*North* II"), *cert. denied*, 500 U.S. 941 (1991),

thermore, while Montoya did not make the kind of stipulation the defendant did in *Lipkis*, in this case we agree with the district court that a hearing was unnecessary because no issues were left to resolve. The declarations filed by the Government were exhaustive, detailed, nonconclusory in form, and uncontradicted. They did not simply ask the court to rely on the Government's good faith. *See Block*, 535 F.2d at 1169.

The Montoyas argue that the declarations served only to put issues in dispute and did not avoid, but rather required, an evidentiary hearing. The Montoyas contend that a hearing is necessary to resolve various alleged inconsistencies and misleading and inaccurate statements in the declarations. However, their attempt to create inconsistencies misses the mark.

First, they contend AUSA Meza states in her declaration that she had not been exposed to any of Montoya's statements or immunized testimony, while also admitting that she saw a copy of the request for authority to prosecute Montoya. Meza in fact stated in her declaration that "[a]lthough I saw a copy of the U.S. Attorney's request for authority to prosecute Montoya, I have never seen transcripts of Montoya's testimony or reports of his interviews." As we have described, Meza's exposure to the request for authority to prosecute would not require her to withdraw from the case, did not constitute non-evidentiary use, and likewise does not necessitate a *Kastigar* hearing. The Montoyas' contentions with regard to the Meza declaration do not raise an issue of fact warranting a *Kastigar* hearing.

Second, the Montoyas contend that AUSA Weiner was in possession of at least one report which referenced and dis-

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in support of their argument that they were entitled to a hearing. In *North* II, the court stated that "[m]ost important, the defendant is entitled to a *hearing* at which he would be able to challenge the prosecution's case for non-use." *Id.* at 943. The situation in *North* was unique in that the defendant's immunized testimony before Congress was televised and therefore potentially exposed to all of the witnesses for North's subsequent criminal trial.

cussed Montoya's testimony, in conflict with Weiner's statement in his declaration that he had "carefully reviewed the materials that Ms. Meza had assembled in connection with the investigation and determined that none of these materials included any reference to prior testimony or prior interviews with Filiberto E. Montoya." However, the one example of such a report that the Montoyas point to on appeal, entitled "Filiberto Montoya-Esparaza Real Estate Investigation," does not discuss Montoya's immunized testimony. The closest it comes to the immunized testimony is the reference to the fact that in the Contreras-Subias investigation, Reese "was convinced that Montoya was not being truthful."

The Government conceded in its brief that the Reese report (the application for permission to prosecute) was in the Weiner team materials. While Meza's declaration states that she read the application, Weiner's declaration does not specifically address whether or not he read the application.[11] Even if Weiner, or members of his investigation team, were exposed to the application, as we have explained, given the content of the application, it would not constitute significant exposure such that it constituted non-evidentiary use.

[13] Finally, the Montoyas contend that had the district court granted an evidentiary hearing and cross-examination, it would have learned that Reese assisted the other eight declarants in preparing their declarations. Reese explained at an earlier hearing before a magistrate judge that he managed the collection of the declarations and did make some suggestions as to form and content. To the extent that the Montoyas suggest that the Government's declarations were therefore contrived, false, or even tainted, we reject the argument. Reese's involvement in the preparation and collection of the declara-

[11]Weiner's declaration states that he "carefully reviewed the materials that Ms. Meza had assembled in connection with the investigation and determined that none of these materials included any reference to prior testimony or prior interviews with Filiberto E. Montoya."

tions did not necessitate the cross-examination of the other eight declarants.

[14] In this case, the district court's careful review of all of the declarations and discovery documents complied with due process, and the refusal to allow cross-examination was an appropriate exercise of judicial discretion. The alleged internal inconsistencies in the declarations do not call into question the Government's proof by a preponderance of the evidence that all evidence utilized in the indictment of the Montoyas was obtained from independent sources and that the Weiner prosecution team had no access to the immunized testimony.

C. Vindictive Prosecution and Outrageous Government Conduct

[15] The Montoyas also contend that the district court should have dismissed the indictment because it was based on outrageous government conduct and vindictive prosecution due to the Government's dissatisfaction with Filiberto Montoya's immunized testimony. We disagree.

"To establish a prima facie case of prosecutorial vindictiveness, a defendant must show either direct evidence of actual vindictiveness or facts that warrant an appearance of such." *United States v. Sinigaglio*, 942 F.2d 581, 584 (9th Cir. 1991). "Evidence indicating a realistic or reasonable likelihood of vindictiveness may give rise to a presumption of vindictiveness on the government's part." *Garza-Juarez*, 992 F.2d at 906. However, the Supreme Court has emphasized that this presumption must be supported, because at the pretrial stage, " 'the prosecutor's assessment of the proper extent of prosecution may not have crystallized.' " *Id.* (quoting *United States v. Goodwin*, 457 U.S. 368, 381 (1982)). Once a presumption of vindictiveness has arisen, the burden shifts to the prosecution to show that "independent reasons or intervening circumstances dispel the appearance of vindictiveness and justify its

decisions." *United States v. Hooton*, 662 F.2d 628, 634 (9th Cir. 1981), *cert. denied*, 455 U.S. 1004 (1982); *see also Garza-Juarez*, 992 F.2d at 906.

While most vindictive prosecution cases involve re-indictment of a defendant, the mere filing of an indictment can support a charge of vindictive prosecution. *Hooton*, 662 F.2d at 634. However, the Montoyas must still prove an improper prosecutorial motive through objective evidence before any presumption of vindictiveness attaches. *See Goodwin*, 457 U.S. at 380 n.12. Despite the fact that they were provided with numerous internal government documents, they were unable to prove improper motive.

[16] As previously mentioned, the standard of review for claims of vindictive prosecution is unsettled in this circuit. *See Garza-Juarez*, 992 F.2d at 903. Even under the *de novo* standard of review, however, we conclude that the presumption of vindictiveness did not arise in this case. *See Goodwin*, 457 U.S. at 380 n.12; *Jeffers v. Lewis*, 38 F.3d 411, 418 (9th Cir. 1994) (en banc) ("Nor does the prosecutorial practice of threatening a defendant with increased charges if he does not plead guilty, and following through on that threat if the defendant insists on his right to stand trial, create a presumption of vindictive prosecution." (internal quotation and citation omitted)); *cf. Garza-Juarez*, 992 F.2d at 907 (presumption arose, but was rebutted).

Outrageous government conduct is not a defense, but rather a claim that government conduct in securing an indictment was so shocking to due process values that the indictment must be dismissed. *See Hampton v. United States*, 425 U.S. 484 (1976); *United States v. Russell*, 411 U.S. 423, 431-32 (1973). Under the "extremely high standard" of this doctrine, an indictment should be dismissed "only when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice." *Garza-Juarez*, 992 F.2d

at 904 (internal quotation omitted); *see also Solorio*, 37 F.3d at 458.

Other than a reference to "outrageous governmental conduct" in a heading in their opening brief, the Montoyas do not develop this argument until their reply brief. In their reply brief, the Montoyas argue that the indictment of Rosario Montoya is a "vindictive outrage," based on a letter to Filiberto Montoya from AUSA Weiner. The letter stated that "[t]he government would be willing to accept a plea of guilty to one or more specific charges by Filiberto Montoya in return for a conclusion to the government's investigation and no charges being brought" against his wife.

[17] Issues not "specifically and distinctly raised and argued" in the opening brief need not be considered by the court. *Officers for Justice v. Civil Serv. Comm'n*, 979 F.2d 721, 726 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1645 (1993). While we decline to consider the argument in any detail, there is no evidence in this case that would satisfy the "extremely high" burden to establish a claim of outrageous government conduct.

V.

CONCLUSION

There was no error in the district court's refusal to dismiss the indictments. The Government met its burden of proof under *Kastigar* and this court's precedent. There was no evidentiary or non-evidentiary use, direct or indirect, of Filiberto Montoya's immunized testimony. The claim of prosecutorial vindictiveness as a basis for dismissing the indictments fails. We decline to remand the case for a full evidentiary hearing and cross-examination of the nine declarants because under the circumstances of this case, the Government met its *Kastigar* burden of proof without the necessity of a full hearing. We have considered all of the contentions advanced by

the parties and conclude that no further discussion is necessary. The convictions of Filiberto E. Montoya and Rosario Montoya are affirmed.

AFFIRMED.

BRIGHT, Senior Circuit Judge, dissenting.

I respectfully dissent from the majority's opinion which affirms the convictions of Filiberto E. and Rosario Montoya. The majority mistakenly rejects the Montoyas' arguments that this prosecution is tainted because of improper use of Filiberto Montoya's immunized testimony and that the indictment was based on vindictive prosecution.[1]

Non-evidentiary Use of Immunized Testimony

In this case, the crucial issue is whether the Government has demonstrated that it did not use the immunized testimony, directly or indirectly, in prosecution of the Montoyas, as required by *Kastigar v. United States*, 406 U.S. 441 (1972), and the precise wording of the applicable statute.[2] Here, the

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[1]Technically, Rosario Montoya does not qualify for fifth amendment relief, as she gave no immunized testimony. The government, however, agrees that her appeal shall be governed by the resolution on her husband's fifth amendment claims. Thus, we refer to both Montoyas as making the same claims.

[2]18 U.S.C. § 6002 reads, in part:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> . . . .
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not

Government has failed to meet its burden of proof under *Kastigar* and this court's precedent. To the contrary, the evidence indicates that AUSA Reese, the original prosecutor, used Filiberto Montoya's immunized testimony before the grand jury in January 1989 to compare it to prior information contained in the investigation report and also to Montoya's testimony at the Oklahoma trial in May 1989.

As a result of the comparison, AUSA Reese concluded that Montoya had testified untruthfully before the grand jury and in Oklahoma. Rather than prosecuting Montoya for perjury, AUSA Reese initiated the steps leading to the prosecution of the Montoyas for the crimes of which they were ultimately convicted. AUSA Reese's recommendations were set forth in the memorandum to the United States Attorney requesting permission from the Department of Justice to prosecute Montoya for conspiracy to commit bank and mail fraud and money laundering, in addition to the substantive offenses. AUSA Meza and AUSA Weiner, the subsequent prosecutor, were exposed to this recommendation. The prosecutors improperly used Filiberto Montoya's immunized testimony to initiate a case against the Montoyas.

Therefore, the Government could not affirmatively answer the following question: did the Government indirectly use Filiberto Montoya's immunized testimony to indict the Montoyas? The decision to initiate prosecution of an immunized witness may be considered non-evidentiary use of immunized testimony. *United States v. Crowson*, 828 F.2d 1427, 1430

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refuse to comply with the order on the basis of his privilege against self-incrimination; *but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.*

18 U.S.C. § 6002 (emphasis added).

(9th Cir. 1987) (citing *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973)).[3]

As construed by the Supreme Court, 18 U.S.C. § 6002 "provides a sweeping proscription of any use, direct or indirect, of the compelled testimony and any information derived therefrom . . ." *Kastigar*, 406 U.S. at 460. "This total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." *Id.*

The record indicates that Reese used Montoya's immunized testimony as an investigatory lead in deciding to initiate prosecution of the Montoyas which is explicitly prohibited by *Kastigar*. The investigatory lead is a significant use of the immunized testimony. Even if the Government had evidence derived from legitimate independent source, the Government significantly used Montoya's immunized testimony in deciding to initiate prosecution.

The Government, however, failed to show that its decision to initiate prosecution did not rely on Reese's conclusion that Montoya should be prosecuted because of his failure to fully cooperate during the grand jury investigation and at the Oklahoma trial. The record indicates that Reese resorted to using Montoya's immunized grand jury and trial testimony to decide that the prosecution ought to go forward, rather than initiating a prosecution of Mr. Montoya for perjury which is permissible under the statute.

The Government initially possessed information regarding Montoya's connection to the Contreras family. Therefore, the

[3]The *Crowson* court recognized that *United States v. Byrd*, 765 F.2d 1524 (11th Cir. 1985), suggests the contrary where the immunized testimony does not enter into the subsequent trial.

Government did not need to grant Montoya use immunity to obtain evidence of his participation in alleged criminal activity. The AUSA sought Montoya's assistance in arresting and convicting the alleged drug smuggler, Jose Leonardo Contreras-Subias. The Government then granted Montoya use immunity in order to proceed with its case against the Contreras-Subias organization. As the record shows, AUSA Reese became dissatisfied with Montoya's immunized testimony before the grand jury and at trial. Of course, Reese became dissatisfied with Montoya's testimony only by an examination of and comparison to the immunized testimony with other evidence. Reese's comparisons and recommendation to prosecute the Montoyas based on the immunized testimony tainted the entire prosecution of the Montoyas in violation of their fifth amendment right against self-incrimination.

The district court and the majority opinion fail to recognize this important use of the immunized testimony and mistakenly conclude that Reese's involvement was too remote from the criminal proceeding against Montoya to constitute non-evidentiary use of the immunized testimony. The majority opinion seems to adopt the rule that as long as the new prosecution relies on independent evidence that the Government previously possessed, the Government may use immunized testimony against an immunized defendant.

Neither *Crowson* nor *United States v. Byrd*, 765 F.2d 1524 (11th Cir. 1985), answer the precise question before us. This court, in *Crowson*, stated:

> We believe the government's burden of showing that its evidentiary use of the immunized testimony was proper should not change merely because members of the prosecution team had access to the testimony. 'The focus of the inquiry under *Kastigar* . . . is not whether the prosecutor was aware of the contents of the immunized testimony, but whether he

> used the testimony in any way to *build a case* against the defendant.' *Caporale*, 806 F.2d at 1518.
>
> A more difficult question is what proof or procedures the government must employ to carry its burden of showing that it made no non-evidentiary use of the immunized testimony. 'Such [non-evidentiary] use could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy.' *McDaniel* 482 F.2d at 311.

Crowson, 828 F.2d at 1430 (emphasis added). The *Crowson* court concluded:

> The government has established a prior, independent source for all of the evidence introduced before 'the second' grand jury and at trial. Even assuming that this is insufficient to meet the government's burden of showing that there was no non-evidentiary use of Crowson's immunized testimony, we feel that there are other indications that the government *did not indirectly use* his testimony for non-evidentiary purposes despite its admitted access to that testimony.

Id. at 1431 (emphasis added). The emphasized statements above cannot be made here where Reese used and relied on the immunized testimony for bringing on the case.

In *Byrd*, the court recognized the "difficult question" whether *Kastigar* "prohibits any use of immunized testimony for [a] non-evidentiary purpose[.]" *Byrd*, 765 F.2d at 1528-29. The court answered that question in the negative as a case of first impression in that circuit. I reject *Byrd* as inconsistent

with the language of *Kastigar* and the unambiguous wording of the statute.[4]

Vindictive Prosecution

A prima facie case of prosecutorial vindictiveness is established if a defendant shows either direct evidence of actual vindictiveness or facts that warrant an appearance of prosecutorial vindictiveness. *United States v. Sinigaglio*, 942 F.2d 581, 584 (9th Cir. 1991). Evidence indicating a realistic or reasonable likelihood of vindictiveness may give rise to a presumption of prosecutorial vindictiveness. *United States v. Garza-Juarez*, 992 F.2d 896, 906 (9th Cir. 1993). The majority concludes that the Montoyas were unable to prove improper prosecutorial motive which would give rise to a presumption of vindictiveness. I, however, disagree.

In order to decide to initiate prosecution of the Montoyas, AUSA Reese compared the investigatory records, including Montoya's immunized testimony, to determine whether Montoya testified falsely. After Reese determined, in his mind, that Montoya testified falsely, Reese could either prosecute Montoya for perjury, which he was apparently unwilling to do, or proceed against Montoya in another manner.

Reese decided to use all of the information which was initially gathered to prosecute Montoya, without giving Montoya a chance to defend his immunized testimony. Reese was not willing to prosecute Montoya initially because he wanted Montoya to testify against targeted defendants. When Reese became dissatisfied with Montoya's testimony, Reese decided to initiate prosecution.

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[4]*United States v. Byrd*, 765 F.2d 1524, 1531-32 (11th Cir. 1985) (interpreting *Kastigar* as not requiring a court to inquire into a prosecutor's motives in seeking indictment and limiting the privilege against self-incrimination to protect only direct and indirect evidentiary uses of compelled testimony). This writer believes the language in *Byrd* is directly contrary to *Kastigar*.

Reese, in sum, became judge and jury of Filiberto Montoya's conduct. Reese did not have enough proof to proceed with perjury charges so he obviously decided to punish Mr. Montoya with using the information the Government always had to prosecute him, and then, for extra measure, proceeding to recommend prosecution of Mrs. Montoya.

The flaw in this scheme is that the Government should have prosecuted Montoya initially, rather than granting him immunity. Reese, however, resorted to subterfuge. If Montoya lied, Reese, under the statute, could have initiated a prosecution for perjury. Instead, he turned Montoya's fifth amendment privilege against self-incrimination on its head, concluding that Montoya lied and Reese proceeded on a course to "fix" him.

I would not countenance that prosecutorial excessive zeal. To me, the evidence in the record indicates a realistic likelihood of personal pique and personal frustration which gives rise to a presumption of prosecutorial vindictiveness.

Accordingly, I would reverse the Montoyas' convictions.

APPENDIX B

FILED
MAY - 3 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 93-50411
	)	
Plaintiff-Appellee,	)	D.C. No.
	)	CR-92-0572-GT
v.	)	
	)	
ROSARIO MONTOYA,	)	
	)	
Defendant-Appellant.	)	
	)	
UNITED STATES OF AMERICA,	)	No. 93-50440
	)	
Plaintiff-Appellee,	)	D.C. No.
	)	CR-92-0572-GT
v.	)	
	)	
FILIBERTO E. MONTOYA,	)	
	)	
Defendant-Appellant.	)	

Before: BRIGHT,* WIGGINS, and T.G. NELSON, Circuit Judges.

Judges Wiggins and T.G. Nelson vote to deny the petition for rehearing and to

* Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation

reject the suggestion for rehearing en banc. Judge Bright votes to grant the petition for rehearing and recommends acceptance of the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no active judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

(2)

No. 94-1967

Supreme Court, U.S.
FILED
SEP 1 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

FILIBERTO E. MONTOYA AND
ROSARIO MONTOYA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal prosecutor violated the Fifth Amendment or 18 U.S.C. 6002 when he sought approval from the Attorney General to prosecute a witness who testified under a grant of use immunity because the witness had given false and misleading testimony.

2. Whether the federal prosecutor's decision to recommend prosecution because the witness had given false and incomplete testimony is evidence of vindictive prosecution in violation of the Due Process Clause.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 429-466) is reported at 45 F.3d 1286.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1995. The petition for rehearing was denied on May 3, 1995. Pet. App. B. The petition for a writ of certiorari was filed on June 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering guilty pleas in the United States District Court for the Southern District of California, petitioner Filiberto Montoya was convicted of conspiring to commit bank fraud and to engage in monetary transactions in property derived from drug trafficking, in violation of 18 U.S.C. 371, 1344, and 1957(a), and petitioner Rosario Montoya was convicted of making a false statement on a loan application, in violation of 18 U.S.C. 1014. Filiberto was sentenced to 41 months' imprisonment, to be followed by three years of supervised release. Rosario was sentenced to 24 months' imprisonment, the service of which was suspended in lieu of a three-year term of supervised probation. The court of appeals affirmed, with one judge dissenting. Pet. App. 429-466.

1. The present proceedings arose out of the government's investigation of the Contreras-Subias drug trafficking organization. The government learned that several real properties in San Diego County, California, were connected with the Contreras organization. Assistant United States Attorney (AUSA) Reese was assigned to investigate. During the course of that investigation, the government obtained documents indicating that petitioner Filiberto Montoya had acted as a real estate agent in transactions in which members of the Contreras organization or its nominees acquired real property. Pet. App. 435-436.

A separate investigation revealed that Montoya was involved in a real estate transaction in Oklahoma on behalf of the Contreras family. The investigation led to money laundering indictments of members of the Contreras organization in Oklahoma. AUSA Reese

was assigned to assist in that prosecution. Pet. App. 436.

Montoya's attorney contacted Reese, and they discussed the possibility of Montoya's cooperating in the investigation. Reese wrote a letter granting Montoya informal use immunity, and Montoya was subsequently interviewed several times. Montoya later testified under a formal grant of immunity before the grand jury in San Diego and at the Oklahoma trial. Pet. App. 436.

Pursuant to Department of Justice Guidelines that require express written authority of the Attorney General to prosecute an individual for an offense that is closely related to the individual's compelled testimony, see U.S. Attorneys' Manual § 9-23.400 (Oct. 1, 1990), Reese requested authorization from the Attorney General to prosecute petitioners on the instant charges. In the application, Reese stated that Montoya had given false and incomplete testimony both before the San Diego grand jury and at the Oklahoma trial. Reese described two incidents involving Montoya's testimony that led him to that conclusion. First, Montoya initially denied to the grand jury that he knew the leader of the Contreras organization. The application then explained why Reese believed that Montoya had deliberately withheld information about his acquaintance with the leader. Second, at the Oklahoma trial, Montoya denied knowledge of certain summaries of expenses of the properties. Previously, however, Montoya had given the government information which tended to show that the Contreras family rather than the nominal owners controlled the properties. Based on Reese's application, the Attorney General granted

authorization for the instant prosecution. Pet. App. 436-437, 451.

Because of Reese's exposure to Montoya's immunized statements and testimony, petitioners' prosecution was turned over to another AUSA, who later was replaced by AUSA Weiner. Pet. App. 436-437 & n.1. The transcripts of Montoya's grand jury and trial testimony were not made available to the Weiner team investigators, and the reports of his post-immunity interviews were sealed. *Id.* at 448 n.9. The instant indictment followed.

2. Petitioners filed a motion to dismiss the indictment on the ground that it was tainted by Montoya's immunized testimony. In its response to the motion, the government filed declarations from nine prosecutors and agents who participated in the Reese and Weiner investigations. The district court denied the motion to dismiss, finding that the government had shown that the evidence used to indict Montoya came from independent sources. Pet. App. 437-438. The district court granted reconsideration, but once again denied the motion to dismiss. *Id.* at 438-439. The court also denied petitioners' motion to dismiss based on vindictive prosecution. *Id.* at 439. Thereafter, petitioners entered conditional guilty pleas preserving their right to appeal the denial of their motion to dismiss. *Ibid.*

3. The court of appeals affirmed. Pet. App. 429-460. The court first rejected petitioners' claims that the government had made evidentiary use of Montoya's immunized testimony. Pet. App. 444-448. The court concluded that "[t]he nine detailed declarations filed by the Government establish that the indictment rested entirely on [independent] sources." *Id.* at 448.

The court next rejected petitioners' contention that Reese's consideration of the falsity and incompleteness of Montoya's immunized testimony in deciding to recommend prosecution constituted an impermissible non-evidentiary use of that testimony. The court assumed, without deciding, that "some non-evidentiary uses" might be prohibited by the federal immunity statute. Pet. App. 449. Nevertheless, the court concluded that "Reese's involvement in requesting permission to prosecute was too remote from the criminal proceeding against Montoya to constitute non-evidentiary use of the immunized testimony against him." *Id.* at 452-453.

In reaching that conclusion, the court noted that Reese was not preparing the indictment, but was seeking the Attorney General's approval for a prosecution. Pet. App. 450. It further noted that Reese's application did not contain a summary of Montoya's immunized testimony. Rather, it merely described the two incidents that led Reese to believe that Montoya had given false and incomplete testimony. *Id.* at 451. The purpose of transmitting that information, the court explained, was not to show that Montoya was guilty of an offense, but to show that unusual circumstances justified his prosecution. *Id.* at 452. The court concluded that a rule that prevented the Attorney General from considering such information would interfere with the Attorney General's exercise of her discretion, would not be in the best interest of immunized witnesses, and would conflict with the public interest. *Ibid.*

Finally, the court rejected petitioners' contention that their prosecution was unconstitutionally motivated by government vindictiveness. The court con-

cluded that petitioners had failed to prove an "improper motive" for the prosecution. Pet. App. 458.

Judge Bright dissented. Pet. App. 460, 466. In his view, AUSA Reese violated Montoya's Fifth Amendment privilege by using Montoya's immunized testimony in recommending Montoya's prosecution. Pet. App. 462. In addition, Judge Bright concluded that Reese's decision to recommend prosecution based on his conviction that Montoya's testimony was false created a presumption of prosecutorial vindictiveness. *Id.* at 465-466.

ARGUMENT

1. Petitioners contend (Pet. 9-15) that the government improperly used Filiberto Montoya's immunized testimony against him in violation of the federal immunity statute and the Fifth Amendment. That contention is without merit.[1]

a. The immunity statute, 18 U.S.C. 6002, provides in pertinent part that "no testimony or other information compelled under [an immunity] order * * * may be used against the witness in any criminal case." In *Kastigar* v. *United States*, 406 U.S. 441, 448-449 (1972), the Court held that the immunity statute's protection against the use of compelled statements is coextensive with the Fifth Amendment. The Court further held that the statute imposes the burden on the government to show that "the evidence it proposes to use is derived from a

---

[1] Although Rosario Montoya lacks standing to assert her husband's Fifth Amendment privilege, *Rogers* v. *United States*, 340 U.S. 367, 371 (1951), the government has agreed to dismiss her indictment should her husband prevail on his immunity claim. Pet. App. 440 n.4.

legitimate source wholly independent of the compelled testimony." 406 U.S. at 460.

The court of appeals found that the government had met its burden of showing that the evidence it used to obtain an indictment against Montoya was derived from sources that were wholly independent of the immunized testimony, Pet. App. 448, and petitioners do not challenge that conclusion. Rather, they contend (Pet. 6) that AUSA Reese's consideration of the falsity and incompleteness of Montoya's testimony in recommending his indictment constituted an improper non-evidentiary use.

Consistent with the language in *Kastigar* cited above, some courts have held that *Kastigar* precludes only evidentiary uses of immunized statements. See *United States* v. *Serrano*, 870 F.2d 1, 16 (1st Cir. 1989); *United States* v. *Mariana*, 851 F.2d 595, 600-601 (2d Cir. 1988), cert. denied, 490 U.S. 1011 (1989); *United States* v. *Byrd*, 765 F.2d 1524, 1528-1531 (11th Cir. 1985). Other courts have held that certain non-evidentiary uses are also prohibited. See *United States* v. *Semkiw*, 712 F.2d 891, 893-895 (3d Cir. 1983); *United States* v. *McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973). The court of appeals in this case did not attempt to resolve that issue as a general matter. Rather, it assumed that some non-evidentiary uses fall within the prohibitions of the immunity statute. Pet. App. 449. It held, however, that the particular use at issue here falls outside the scope of the immunity statute. *Id.* at 449-453. That holding is correct.

As the court of appeals noted, AUSA Reese used the immunized testimony for the limited purpose of seeking the Attorney General's authorization to prosecute. Pet. App. 450. After the Attorney General

authorized a prosecution, the actual decision to seek an indictment was made by AUSA Weiner, who never read any of Montoya's immunized testimony. Gov't C.A. Br. 8; Pet. App. 456 & n.11. As the court of appeals concluded, "Reese's involvement in requesting permission to prosecute was too remote from the criminal proceeding against Montoya to constitute non-evidentiary use of the immunized testimony against him." Pet. App. 452-453.

Moreover, AUSA Reese did not consider Montoya's testimony as substantive evidence of his guilt, but as evidence that he had not been truthful in his testimony. Consistent with that limited purpose, Reese did not provide a summary of Montoya's testimony to the Attorney General. Rather, he provided two examples from the testimony that showed that Montoya had given false and incomplete testimony. Pet. App. 451. The immunity statute does not preclude the government from deciding to prosecute an immunized witness because it is convinced that the witness has given false and incomplete testimony.

This Court's decision in *United States* v. *Apfelbaum*, 445 U.S. 115 (1980), is instructive. There, the Court held that the Fifth Amendment does not preclude the government from using a witness's immunized testimony at a subsequent prosecution for perjury. The Court explained that the Fifth Amendment does not provide a shield for a witness to commit perjury. *Id.* at 130-132. When a person gives false and incomplete testimony, the government is not limited to filing perjury charges against him. Because such testimony is not protected by the Fifth Amendment, the government may also consider it in deciding to prosecute the witness for an offense related to the immunized testimony, as long as the government's

evidence against the witness is derived from sources that are independent of the immunized testimony. See 2 S. Beale & W. Bryson, *Grand Jury Law and Practice* § 9.19, at 64 (1994 Cum. Supp.) ("it is not a 'use' of immunized testimony for the government to decide to prosecute the witness because it is convinced that the witness has perjured himself in the course of testify-ing under the grant of immunity"); *United States* v. *Burke*, 856 F.2d 1492, 1494 (11th Cir. 1988) (rejecting claim that government improperly decided to pro-secute defendant based on belief she had perjured herself in giving immunized testimony).

A contrary rule would defeat the purposes of the immunity statute. A major advantage of Section 6002 is that it encourages more complete testimony than a transactional immunity statute. Under a transactional immunity statute, a witness could, with impunity, reveal just enough information to obtain blanket immunity and then profess to remember no more. Under Section 6002, by contrast, the government's retention of the power to prosecute based on independent evidence creates a strong disincentive for the witness to withhold information. Thus, the United States Attorneys' Manual expressly provides that "less than complete testimony should not appear to be rewarded by a declination of prosecution in a case where independent evidence clearly exists and the situation otherwise warrants prosecution." U.S. Attorneys' Manual § 9-23.400 (Oct. 1, 1990). By precluding the government from considering, in deciding whether to prosecute, that a witness has given false and incomplete testimony, petitioner's approach would deprive the government of the ability to en-

courage full disclosure by immunized witnesses—a major goal of Section 6002.

b. Petitioners contend that the decision below conflicts with *United States* v. *Olivero*, 39 M.J. 246 (C.M.A. 1994), and *United States* v. *McDaniel*, *supra*. There is, however, no conflict. In *Olivero*, the United States Court of Military Appeals held that the decision to prosecute may not be based on immunized testimony. 39 M.J. at 249. And in *McDaniel*, the Eighth Circuit stated that the prohibited non-evidentiary uses of immunized testimony "could conceivably" include "assistance in * * * deciding to initiate prosecution." 482 F.2d at 311. But in those cases, the government could not show that the person who made the decision to prosecute was unaffected by the immunized testimony. *Olivero*, 39 M.J. at 249-250; *McDaniel*, 482 F.2d at 311. Moreover, in those cases, no contention was made that the immunized testimony was considered for the limited purpose of deciding whether the witness had given false and incomplete testimony. *Ibid.* Accordingly, neither case addressed the situation presented here, *i.e.*, where the person who made the decision to prosecute did not consider the immunized testimony, and those who did consider the immunized testimony did so for the limited purpose of deciding whether the witness had given false and incomplete testimony. There is therefore no conflict between those decisions and the decision below.[2]

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[2] Petitioners' reliance (Pet. 10) on *United States* v. *Byrd*, *supra*, is misplaced. There, the Eleventh Circuit held that *Kastigar* does not require a court "to inquire into a prosecutor's motives in seeking indictment." 765 F.2d at 1530. "So long as all the evidence presented to the grand jury is derived from

2. Petitioners' contention (Pet. 16) that the government engaged in vindictive prosecution is also without merit. Under the doctrine of vindictive prosecution, it violates due process for a prosecutor to use the charging process to penalize the exercise of constitutional or statutory rights. See, *e.g.*, *Blackledge* v. *Perry*, 417 U.S. 21 (1974); *North Carolina* v. *Pearce*, 395 U.S. 711, 723-724 (1969). The short answer to petitioners' claim of vindictive prosecution is that Filiberto Montoya had no constitutional or statutory right to give false and incomplete testimony under the grant of immunity. *E.g.*, *Apfelbaum*, 445 U.S. at 127. Accordingly, to the extent the decision to prosecute petitioners rested on Montoya's lack of candor in giving his immunized testimony, that consideration did not have the effect of penalizing the exercise of any of his legally protected rights.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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legitimate sources independent of the defendant's immunized testimony, and the grand jury finds that independent evidence sufficient to warrant the return of an indictment, the defendant's privilege against self-incrimination has not been violated." *Ibid.* *Byrd* therefore provides no assistance to petitioners here.